

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

HOUSTON SPECIALTY INSURANCE
COMPANY, a Delaware corporation;

Plaintiff,

vs.

THE RODRIGUEZ CORPORATION., an Oregon
company; and CITY OF WALDPOR, an Oregon
municipal corporation;

Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY RELIEF**

I. PARTIES

1. Plaintiff Houston Specialty Insurance Company, (hereinafter “HSIC”), is a foreign insurance company organized under the laws of the State of Delaware with a principal place of business located in the State of Texas

2. The Rodriguez Corporation (hereinafter “TRC”) is an Oregon corporation with its principal place of business located in the State of Oregon.

3. City of Waldport (hereinafter “Waldport”) is an Oregon municipal corporation.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this claim pursuant to as the amount in controversy exceeds \$75,000.00, exclusive of interest and costs, and diversity amongst the parties is complete.

5. Venue is proper with this Court pursuant to 28 U.S.C. § 1391 as this case involves TRC's claims for insurance coverage stemming from an alleged loss occurring in Oregon, and a lawsuit filed in Oregon.

III. FACTS

A. The Underlying Lawsuit

6. HSIC reasserts paragraphs 1-5 as fully set forth herein.
7. Waldport is a municipal corporation located in Lincoln County, Oregon.
8. Waldport owns and operates a 2.0 million gallon reservoir.
9. Waldport hired TRC to prepare and re-coat the reservoir's interior surfaces (hereinafter the "Subject Project").
10. TRC began work in March 2013.
11. TRC stopped working in June 2013.
12. Approximately one year later, the reservoir was drained and reopened.
13. At that time, Waldport has claimed defects in TRC's work were discovered.
14. Waldport demanded TRC repair the defective work.
15. Waldport and TRC disagreed as to the extent of the repairs required.
16. Waldport requested that TRC remove and replace the tank coating in the reservoir that was installed by TRC.
17. Waldport alleges that TRC failed to take corrective action, and as a result, terminated the construction contract between Waldport and TRC.
18. On or about March 31 27, 2017, Waldport filed suit against TRC and the bond company, Lexon Insurance Company (hereinafter "Lexon").

19. Waldport asserted causes of action for Breach of Contract, Declaratory Judgment, Breach of Performance Bond, and Bad Faith.

20. Waldport's Complaint defined "Work" as "preparation and re-coating of [the reservoir's] interior surfaces."

21. Waldport asserted the following damages allegedly caused by TRC:

- \$266,977 for the cost of removal and replacement of defective work;
- \$16,086 for the cost of engineering services expended in testing the defective work;
- \$2,440.64 for the costs of draining the reservoir; and
- \$16,879 in attorney fees.

Waldport's total plead damages were \$302,382.64.

22. On June 27, 2017, Waldport filed an Amended Complaint which added a claim for negligence.

23. The Amended Complaint contained no allegations of property damage to any component of the reservoir that was beyond the scope of TRC's work.

24. The dispute between Waldport and TRC was eventually transferred to private arbitration (hereinafter the "Underlying Action").

25. On or about October 16, 2018, the arbitrator entered an Interim Award in favor of Waldport in the amount of \$406,829.

B. The Policies Issued By HSIC To TRC

26. HSIC issued the following commercial general liability insurance policies to TRC:

- TEN-10821, with a policy period of February 20, 2012 to February 20, 2013 (hereinafter the "2012-2013 Policy");
- TEN-12166, with a policy period of February 20, 2013 to February 20, 2014 (hereinafter the "2013-2014 Policy");

- TEN-13699, with a policy period of February 20, 2014 to February 20, 2015 (hereinafter the “2014-2015 Policy”);
- TEN-15356, with a policy period of February 20, 2015 to February 20, 2016 (hereinafter the “2015-2016 Policy”);
- TEN-17051, with a policy period of February 20, 2016 to February 20, 2017 (hereinafter the “2016-2017 Policy”); and
- TEN-18960, with a policy period of February 20, 2018 to February 20, 2018 (hereinafter the “2017-2018 Policy”).

The policies described above are hereinafter collectively referred to as the “HSIC Policies.”

27. TRC is the Named Insured on all of the HSIC Policies.
28. The HSIC Policies provide coverage up to limits of \$1,000,000 per occurrence and \$2,000,000 general aggregate.
29. The HSIC Policies contain the following Insuring Agreement:

INSURING LANGUAGE - THIS POLICY ONLY APPLIES TO BODILY INJURY AND PROPERTY DAMAGE WHICH FIRST MANIFESTS DURING THE POLICY PERIOD AND TO PERSONAL AND ADVERTISING INJURY WHEN THE DAMAGE FROM THE OFFENSE FIRST MANIFESTS DURING THE POLICY PERIOD. A. SECTION I - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 1.

...

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured or any Additional Insured against any "suit", "loss", "claim", "occurrence", or incident seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" they may result. But:

(1) The amount we will pay for damages is limited as described in **Section III - LIMITS OF INSURANCE**; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under **Coverages A or B** or medical expenses under **Coverage C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under **SUPPLEMENTARY PAYMENTS - COVERAGES A and B**.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" and "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" first manifests during the policy period. This insurance does not apply to any "bodily injury" or "property damage" that is, or alleged to be, continuous or progressively deteriorating and that first manifests prior to the inception date of this policy or retroactive date of this policy, if any, or after the expiration of this policy, even if such "bodily injury" or "property damage" continues or deteriorates during the term of this policy.

d. For the purposes of this endorsement, "bodily injury" first manifests when it is medically diagnosed, and "property damage" first manifests at the time it is apparent to any person, including, but not limited to, an "insured", an Additional Insured, a "claimant", or a property owner. "Claimant" means a person or entity who makes a claim or brings a "suit" against an "insured."

e. In the event this policy is renewed and coverage extends for more than one policy term, the following applies:

(1) The most we will pay for "bodily injury" and "property damage" that is continuous or progressively deteriorating, and that first manifests during one of the periods of this policy, is the applicable limit of insurance available with respect to only that one policy period.

(2) The limit specified in Paragraph e. 1 above is the only limit that applies to any related "bodily injury" or "property damage" regardless of whether such injury or damage existed before, or continues or progressively deteriorates after, the policy period in which the "bodily injury" or "property damage" first manifests.

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30. The HSIC Policies provide the following definitions which are relevant to the Insuring Agreement:

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

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17. "Property damage" means:

- a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

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31. The HSIC Policies contain the following exclusions:

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured.

This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such a party for, or for the costs of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

...
j. Damage To Property

"Property damage" to:

...

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

...

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products completed operations hazard".

...

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

...

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

...

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by your or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall of Products, Work or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property"

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

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32. The HSIC Policies contain the following Endorsement regarding Professional Services:

EXCLUSION - DESIGNATED PROFESSIONAL SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SCHEDULE

Description Of Professional Services:
1. The preparing, approving, recommending or failing to prepare, approve or recommend maps, drawings, opinions, reports, surveys, change orders, designs, specifications, hazard assessment plans, response actions, abatement methods or products, air monitoring plans or insurance requirements
2. Supervisory, inspection, training or engineering services; or
3. Commercial or industrial hygiene, air monitoring, testing, laboratory analysis, public health, legal, accounting, architectural, medical, nursing, data processing, consulting or investment advisory services.

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

With respect to any professional services shown in the Schedule, the following exclusion is added to Paragraph 2., **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability**:

This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" due to the rendering of or failure to render any professional service.

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33. The HSIC Policies contain the following relevant definitions:

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

...

9. "Insured contract" means:

...

- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be

imposed by law in the absence of any contract or agreement.

...

16. "Products-completed operations hazard":

- a.** Includes all "bodily injury" and "property damage" occurring away from premises you own or rent arising out of "your product" or "your work" except:

- (1)** Products that are still in your physical possession; or
- (2)** Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a)** When all of the work called for in your contract has been completed.
 - (b)** When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c)** When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

- b.** Does not include "bodily injury" or "property damage" arising out of:
- (1)** The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
 - (2)** The existence of tools, uninstalled equipment or abandoned or unused materials; or

- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products completed operations are subject to the General Aggregate Limit.

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21. "Your product":

a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- (a) You;
 - (b) Others trading under your name; or
 - (c) A person or organization whose business or assets you have acquired; and

- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
- (2) The providing of or failure to provide warnings or instructions.

...

22. "Your work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

34. HSIC reserves the right to assert any other policy language or policy coverage forms that may be potentially applicable to TRC's claims and the claims asserted in the Underlying Action.

D. Tender To HSIC

35. TRC tendered a claim to HSIC on or about June 18, 2017.

36. HSIC evaluated its coverage obligations based upon the allegations set forth in Waldport's Amended Complaint.

37. HSIC determined that based upon the allegations of the Amended Complaint, it had no obligation to defend or indemnify TRC.

38. On or about April 17, 2018, TRC asked HSIC to reconsider its coverage position.

39. Again, HSIC evaluated the claims against TRC as set forth in Waldport's Complaints.

40. HSIC again determined that the allegations in the Complaint did not give rise to coverage obligations under the HSIC Policies.

IV. THERE IS AN ACTUAL AND JUSTICIABLE CONTROVERSY AS TO HSIC's COVERAGE OBLIGATIONS

41. HSIC reasserts paragraphs 1-40 as fully set forth herein.

42. There is no coverage available to TRC for the claims asserted against it in the Underlying Action.

43. The HSIC Policies provide that HSIC will pay damages which an insured becomes legally obligated to pay because of "bodily injury" or "property damage" caused by an

“occurrence” and which first manifests during the policy period. “Property damage” is defined generally as “physical injury to tangible property or loss of use of tangible property that is not physically injured.” “Occurrence is defined general as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

44. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Action first manifested during the policy periods of the HSIC Policies.

45. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Action was caused by an “occurrence,” as that term is defined in the HSIC Policies.

46. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Lawsuit constituted “physical injury to tangible property or loss of use of tangible property that is not physically injured.”

47. The HSIC Policies do not provide coverage for “property damage” expected or intended from the standpoint of the insured.

48. There is an actual and justiciable controversy as to whether TRC expected or intended the alleged “property damage”

49. The HSIC Policies do not provide coverage for liability assumed under a contract that does not qualify as an “insured contract.”

50. There is an actual and justiciable controversy as to whether TRC is liable for the claims alleged in the Underlying Action based on liability it assumed under a contract that does not qualify as an “insured contract,” as that term is defined by the HSIC Policies.

51. The HSIC Policies do not provide coverage for “property damage” to the particular part of real property in which the insured was operating and arising out of those operations.

52. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Action was to the particular part of real property in which TRC was operating and arising out of those operations.

53. The HSIC Policies do not provide coverage for “property damage” to the particular part of any property that must be restored, repaired or replaced because TRC’s work was incorrectly performed on it.

54. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Action was to a particular part of property that must be restored, repaired or replaced because TRC’s work was incorrectly performed on it.

55. The HSIC Policies do not provide coverage for “property damage” to TRC’s “product” arising out of it or any part of it.

56. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Action was to TRC’s “product” arising out of it or any part of it.

57. The HSIC Policies do not provide coverage for “property damage” to TRC’s “work” arising out of it or any part of it and included in the “products-completed operations hazard.”

58. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Action was property damage to TRC’s “work” arising out of

it or any part of it and included in the “products-completed operations hazard,” as those terms are defined by the policies.

59. The HSIC Policies do not provide coverage for “property damage” to “impaired property” arising out of a defective condition in TRC’s “product” or “work” or a delay or failure by TRC to perform a contract or agreement in accordance with its terms.

60. There is an actual and justiciable controversy as to whether the “property damage” alleged in the Underlying Action was “property damage” to “impaired property” arising out of a defective or dangerous condition in TRC’s “product” or “work” or a delay or failure by TRC to perform a contract or agreement in accordance with its terms.

61. The HSIC Policies do not provide coverage for any damages arising from the withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of TRC’s “work,” TRC’s “product” or “impaired property,” if the such product, work or property is withdrawn or recalled from the market or from use because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

62. There is an actual and justiciable controversy as to whether the damages alleged in the Underlying Action arose from the withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of TRC’s “work,” TRC’s “product” or “impaired property,” because such product, work or property was withdrawn or recalled from the market or from use due to a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

63. The HSIC Policies do not provide coverage for “property damage” due to the rendering or failure to render professional services.

64. There is an actual and justiciable controversy as to whether any alleged “property damage” was due the rendering or failure to render professional services.

65. HSIC reserves the right to assert any other exclusions or grounds for which coverage for the claims against the defendants may be excluded under the policies of insurance issued by HSIC.

V. FIRST CAUSE OF ACTION – DECLARATORY RELIEF
(Against All Defendants)

66. HSIC reasserts paragraphs 1 - 65 as fully set forth herein.

67. HSIC is entitled to Declaratory Judgment in its favor, specifically including a judicial determination as to its coverage obligations to the defendants, their agents, employees, or elected officials under the policies of insurance issued by HSIC to TRC for the claims asserted against TRC in the Underlying Action.

VI. PRAYER FOR RELIEF

HSIC, having alleged the foregoing, does now, hereby, pray for relief as follows:

1. For a declaration that HSIC owes no defense obligation to TRC for any claims asserted in the Underlying Action.

2. For a declaration that HSIC owes no indemnity obligation to TRC for any claims asserted in the Underlying Action.

3. For all interest allowed by law.

4. For attorney fees and costs allowed by statute and law.

5. For other and further relief as the Court deems just and equitable.

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DATED this 26th day of October, 2018.

LEATHER & ASSOCIATES, PLLC

/s/ Thomas Lether

Thomas Lether, OSB # 101708

/s/ Eric J. Neal

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